International Association of Machinists and Aerospace Workers, District 70 (NCR Corporation) *and* Deborah S. Maness. Case 17-CB-2699

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 20 May 1983 Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent Union violated Section 8(b)(1)(A) by: threatening Deborah Maness with disparate or inferior representation because she was not a member of the Union; coercing Maness into joining the Union and executing a dues-checkoff authorization; refusing to rescind her dues-checkoff authorization on request; and refusing to honor Maness' request to resign from the Union. The judge dismissed the complaint in its entirety. In limited exceptions, the General Counsel argues that the Union violated Section 8(b)(1)(A) by refusing to honor Maness' resignation. We find merit in the General Counsel's exceptions.

The pertinent facts are as follows. On 22 October 1982[1] Maness joined the Union by signing a membership application, a dues-checkoff authorization, and a union insurance plan card. Thereafter, Maness changed her mind. On 1 November she told Union Local President Richard Flaherty and Business Representative Jack Metz that she had changed her mind and wanted her papers back. Metz told her that he no longer had her papers and that he would check with his supervisors. On 17 November Maness met again with Flaherty and Metz. She reiterated her request that her papers be returned to her. Metz told her that they could not be returned and that she was a member of the Union.[2] In early January 1983 Maness submitted to the Employer a written resignation stating, "I want to get out of the Union," which the Union subsequently received. There is no evidence in the record that the Union maintained any restrictions on its members' right to resign.

On the foregoing facts, the judge found that the Respondent did not violate the Act by refusing to honor Maness' request to resign from the Union. In his view, the Union acted lawfully "because the proviso to Section 8(b)(1)(A) gives unions the right to make their own rules concerning 'acquisition or retention of membership.'" We disagree with the judge's analysis.

The Board has held that, where a union maintains no restrictions on an employee's right to resign from union membership, the employee is free to resign at will, and the union violates Section 8(b)(1)(A) if it refuses to honor the employee's clear and unequivocal request to resign. *Electrical Workers IBEW Local 66 (Houston Lighting & Power Co.)*, 262 NLRB 483, 486 (1982); *Distillery Workers Local 80 (Capitol-Husting Co.)*, 235 NLRB 1264, 1265 (1978). As noted above, the record reveals the Union maintained no restrictions on its members' right to resign.[3] Maness, therefore, was free to resign at will. She plainly communicated her desire to resign to responsible union officials who summarily denied her request. Accordingly, the Respondent violated Section 8(b)(1)(A) by refusing to accept Maness' resignation.[4] We shall, therefore, order the appropriate remedy.

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Machinists and Aerospace Workers, District 70, Wichita, Kansas, its officers, agents, and representatives, shall

[1] All dates refer to 1982 unless otherwise noted.

[2] Subsequently, the Union did honor Maness' timely request to revoke her dues-checkoff authorization. There is no contention before the Board that the Union acted unlawfully regarding the dues-checkoff authorization.

[3] This case, therefore, does not present the issue of what restrictions, if any, a union may effectively place on its members' right to resign. See, e.g., *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982). We do note, however, that even if the Respondent did, in fact, maintain restrictions on resignation, they were never communicated to Maness and the Respondent did not rely on them. See *Auto Workers Local 1384 (Ex-Cell-O Corp.)*, 227 NLRB 1045 (1977).

[4] In dismissing this aspect of the complaint, the judge relied on *Carpenters Local 1233 (Polk Construction)*, 231 NLRB 756, 761 (1977), citing language which indicates that a union does not violate the Act when, without more, it refuses to accept an employee's resignation. That language is plainly inconsistent with the Board's subsequent holdings in *Houston Lighting & Power*, supra, and *Capitol-Husting*, supra. *Polk Construction* was effectively overruled in pertinent part by *Machinists Local 1327 (Dalmo Victor)*, supra, 263 NLRB 984 (1982), in which a majority of the full Board specifically held that employees have a Sec. 7 right to resign their union memberships. Chairman Dotson and Member Dennis agree that employees have a Sec. 7 right to resign, but find it unnecessary to pass on any other aspects of the Board's *Dalmo Victor* decision in the instant case. In finding that the Respondent violated Sec. 8(b)(1)(A) of the Act, Member Hunter relies on his prior concurring opinion in *Dalmo Victor*.

1. Cease and desist from

(a) Refusing to acknowledge the effectiveness of Deborah S. Maness' resignation from membership in the Respondent.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Deborah S. Maness, in writing, that Maness has effectively resigned from the Respondent.

(b) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director sufficient signed copies of the notice for posting by NCR Corporation, if willing, in places where notices to employees are customarily posted. The copies, after being signed by the Respondent's authorized representatives, shall be returned forthwith to the Regional Director.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that, insofar as it alleges matters that have not been found to be violations of the Act, the complaint is dismissed.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to acknowledge the effectiveness of Deborah S. Maness' resignation from membership in International Association of Machinists and Aerospace Workers, District 70.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify Deborah S. Maness, in writing, that she has effectively resigned her membership.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 70

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on April 14, 1983, at Wichita, Kansas, on the General Counsel's complaint alleging that the Respondent labor organization threatened the Charging Party with disparate or inferior representation because she was not a member and had not elected to execute a dues-checkoff authorization; coerced her into executing a dues-checkoff authorization and application; and has refused her request to rescind the application and authorization. It is alleged that by these acts the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act. The Respondent generally denies that it committed the unfair labor practices alleged.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of the parties, I issue the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

NCR Corporation is engaged in the manufacture of business machines and related products at various facilities throughout the United States including one at Wichita, Kansas. In the course and conduct of its business, NCR annually purchases directly from points outside the State of Kansas goods and services valued in excess of $50,000. NCR is admitted to be, and I find is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Association of Machinists and Aerospace Workers, District 70 (the Respondent or Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

For a number of years the Union has been the exclusive bargaining representative of certain NCR Corporation employees in a basic production and maintenance unit. The Union and NCR Corporation have executed successive collective-bargaining agreements. The collective-bargaining agreement in effect during the time material to this matter was effective from March 24, 1980, through March 26, 1983.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Statement of Facts*

Deborah Maness has a problem. She has difficulty getting to work on time. She testified, "I realized that I had a problem. But my problem with being late and being absent is—it has not just been going on since I worked for NCR. I am not a morning person. Waking up in the morning is very difficult for me. And that I knew that I had a problem and I knew my job was in some sort of jeopardy unless I corrected this problem."

During the 2-1/2 years she has worked for NCR, she has been late many times and such has been a matter of concern on the part of her supervisors.

Thus she testified that in 1980 she was given a 3-day suspension for tardiness and absenteeism, although union steward Wilma Fielder testified that this event took place in 1981, and the termination form, infra, indicates it was 1982. In any case, Maness has received formal discipline for tardiness and absenteeism as well as informal counseling by her supervisors.

On the morning of October 22, 1982, Maness called to tell her supervisor that "I will be there shortly, that I had overslept that morning." When she finally arrived at work she went to pick up her timecard but was advised that she was going to be terminated because of her excessive absences and tardiness. She was told to go to her work area and await her supervisor and a representative from the Union.

Maness' supervisor, Michael O'Brien, gave her an "Employee Written Warning" which stated "that she was out of chances" and "since June of 82 she had been tardy 12 times and absent once." Thus as of that day she was being terminated. On the form it was also noted that she had received a written warning on June 1, 1982, and another on April 26, 1982.

Fielder looked at the document and commented she thought there was something wrong with it and went to discuss the matter with the Union's president, employee Richard Flaherty. In a discussion with O'Brien, Flaherty noted that the termination rested in part on a warning of June 1, 1981, which was more than 1 year old. According to the Company's progressive discipline system and the collective-bargaining agreement, warnings are to be disregarded after 1 year; and an employee cannot be discharged for tardiness or absenteeism except as a third step—that is, having received two written warnings (the second being a 3-day suspension) on the subject within the previous year. O'Brien checked this with the personnel office, apparently, and ultimately agreed that the discharge of Maness was inappropriate. Thus the discipline was reduced to a 3-day suspension.

Flaherty then asked of O'Brien if he and Fielder could take Maness to the cafeteria and talk to her. Permission was given and the three spent about an hour in the cafeteria discussing her attendance problem and later the fact that she was not a member of the Union.

During this conversation Flaherty gave Maness some ideas concerning how she might improve on her propensity to oversleep. Subsequently he asked if she belonged to the Union, and she said she did not. He urged her to join stating something to the effect that the collective-bargaining agreement was about to expire and that they were going to negotiate a new one. They needed as many members as possible. He noted that the Union could achieve more and better benefits for employees if more employees were members. He also pointed out that they had helped her stay employed.

Maness stated that, while she did not oppose unions in general, she did not feel that she was in a position to "obligate" herself, "that I could not give 100% . . . ." She said she had a number of debts and could not afford the dues. But she said that some of her debts would be paid by November. Flaherty and Fielder offered to postdate the application to December so that dues would not start being withdrawn from her paycheck until January and Maness agreed. She signed an application and a dues-checkoff authorization.

Thereafter, Maness had a change of heart, and asked to have her papers returned. She was referred to Jack Metz, the Union's business representative, who after checking subsequently told her the papers would not be returned and she would be a member. However, after filing the charge herein, Maness did submit a revocation of the dues checkoff which was effective at the end of the contract. (The dues-checkoff form tracks the language of Sec. 302(c) of the Act allowing revocation at the end of the collective-bargaining agreement.) Thus Maness paid dues through payroll deduction for the months of January, February, and March 1983.

The General Counsel contends that Flaherty and Fielder told Maness that unless she joined the Union the Union would not represent her effectively. Thus it is alleged that in persuading her to join and sign a dues-checkoff authorization and thereafter failing to revoke them upon her request, the Union violated Section 8(b)(1)(A).

B. *Analysis and Concluding Findings*

It is a violation of Section 8(b)(1)(A) "to threaten to deny employees who are not members of the Union equal representation with employees who are union members in the bargaining unit." *Newport News Shipbuilding & Dry Dock Co.*, 236 NLRB 1470, 1473 (1978). And it follows that membership coerced by a threat is not voluntary. Thus the issue here involves what was said to Maness on October 22 by Flaherty and Fielder. Indeed the only area of contention in this matter is Maness' testimony that during the conversation she had with Flaherty and Fielder on October 22 she was threatened with disparate representation if she did not join.

In material part, Maness testified:

> He [Flaherty] asked me again, "Now, do you think that it is right that we're doing all this for you, and yet, you don't pull your own weight?" "Can you afford to be without union protection?" Because a union member stood a better chance of getting superior representation than a nonmember.

And:

> He [Flaherty] just told me, you know, he asked me again, didn't I want to join. And when I didn't say

> anything, he told me that a person who is in the union stood a better chance of getting extra help that the union could give than a person who was not a member in the union would get.
>
> He asked me, could you afford to be without the protection of the union. By not being a member, you're taking a chance with the kind of representation you're going to receive if you ever need our help again.

And again:

> I was told that they would work a little bit harder and push just a little bit more for somebody that was a member than they would somebody who was not a member.

Maness further testified that at the time of a previous discipine in 1980 (probably the one in 1981 when her supervisor was Roy Smith) she was told the same thing—although the Union did represent her then, since she was not a member she could not expect to get as good representation in the future.

Both Flaherty and Fielder categorically denied that they made any statements along the lines testified to by Maness. Flaherty further testified that he had no conversation at all with Maness concerning any earlier discipline. Fielder testified that, when she represented Maness in 1981, no such statements were made.

I believe the testimony of Flaherty and Fielder and I specifically discredit the testimony of Maness. In addition to their relative demeanor, I found Maness to be an unreliable and irresponsible person fully capable of misremembering events.

Further, Maness' story is inherently incredible. She testified that in 1980 (probably 1981) the Union represented her in connection with discipline for her attendance problem and she was then told that unless she joined the Union she could not expect to be effectively represented in the future. Yet when she was terminated, and by her own admission assumed that the termination was valid, the very people who she testified stated that they would not help her in fact did so. Also, Maness' testimony, even at face value, is vague, with words such as "extra help" and "work a little but harder."

While I have no doubt that Flaherty and Fielder sought to enlist Maness as a member, particularly after they had spent some time and some of the Union's treasury (Flaherty clocked out on union business) in reducing her termination to a suspension, I do not believe that they in any way indicated that she would not be effectively represented in the future unless she joined the Union. Flaherty may very well have stated that in general employees with unions get better representation vis-a-vis management than employees without unions. And he no doubt pointed out the reasonableness of her supporting the organization that had saved her job. But such does not mean that he or Fielder would not, to the best of their ability, represent all members of the bargaining unit regardless of union membership.

Nor is there any evidence of animosity by Flaherty, Fielder, or any other official of the Union against those employees of NCR who chose not to become members of the Union. Nor is there any evidence that Flaherty, Fielder, or any other official of the Union ever failed or refused to represent a nonmember employee. Indeed the only evidence on this subject is to the contrary. Flaherty testified that the Union has and does process grievances for nonmembers. In fact he does not know when he gets a grievance whether the individual is a member or not.

I believe, and conclude, that on the morning of October 22 following the reversal of Maness' termination Flaherty and Fielder did have a lengthy discussion with her and during that time did urge her to become a member of the Union, pointing out that the Union had helped her substantially. Such is neither unreasonable nor against the law. I believe further that Maness tried to avoid joining the Union as she had in the past by pleading an inability to pay the dues money as a result of having other financial obligations. However, when the union representatives agreed to postdate the application and not to start collecting dues until January, I believe Maness agreed to become a member of the Union. None of this violates Section 8(b)(1)(A) of the Act.

Further, after Maness did sign the dues-checkoff authorization and application for membership, the failure of the Union to return them to her on her request was not violative of the Act, because the proviso to Section 8(b)(1)(A) gives unions the right to make their own rules concerning "acquisition or retention of membership." E.g., *Carpenters Local 1233 (Polk Construction)*, 231 NLRB 756 (1977). The timely submitted checkoff revocation was in fact honored.

In short, I find and conclude that the General Counsel has not established the factual basis of the allegation that Maness was threatened with disparate representation unless she joined the Union. Therefore when the Respondent thereafter failed to return the application and checkoff authorization to her this was not violative of the Act, nor was collecting dues during the 3 months the authorization was effective.

I therefore conclude that the General Counsel has not proved by a preponderance of the credible evidence the allegations set forth in the complaint and I shall recommend that it be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]